

Disclosure in Judicial Review after *Tweed*.

By Ben Rayment *
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Introduction

Applications for disclosure in claims for judicial review have hitherto been governed by a restrictive rule that disclosure will only be given where there is some prima facie case for suggesting that the evidence relied upon by the decision-maker is in some respects incorrect or inadequate.¹ This reflects the view that to give disclosure in other circumstances would be to permit an 'improper' challenge to the accuracy of the respondent's affidavit evidence. In particular, the justification for the rule was based on (a) the duty to make candid disclosure of the relevant facts and reasoning behind the decision by affidavit or witness statement; and (b) the undesirability of fishing expeditions. In *Tweed v Parades Commission for Northern Ireland*² the House of Lords has substituted this rigid rule with a more flexible approach particularly (but not exclusively) in human rights cases involving questions of proportionality. The case is therefore of interest not just to human rights lawyers but to public lawyers more generally, including competition and other lawyers dealing with regulatory decisions.³

* Barrister, Monckton Chambers. This note reflects the author's own opinion.

¹ See, eg, *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386, at p 396. The rule is stated in the *White Book Service 2006* (Vol 1, at para 54.16.2) as follows, 'a claimant will not be granted an order for disclosure to go behind the written evidence to ascertain whether the statements in that written evidence are correct unless there is some material outside that evidence which suggests that it is inaccurate, misleading or incomplete in some material respect'.

² [2006] UKHL 53, [2006] All ER (D) 175 (Dec).

³ As to the potential application of *Tweed* in the competition law context see [2006] Comp Law (issue 4)

Factual background

The appellant, Mr Tweed, was a member of the local Orange Lodge in Dunloy in Northern Ireland. Members of the lodge had for many years paraded along the 325 yards between the Orange hall in Dunloy to the Presbyterian church. Tensions over parades along that route had mounted over the years. In 2004 the appellant gave notice as required of an intention to parade along the route (regalia was to be worn).

The Parades Commission determined that should the parade process along the entirety of its notified route there would be an adverse effect on community relations and a potential for public disorder. It therefore restricted the parade to the frontage of the Orange hall, which the appellant unsurprisingly regarded as little different in effect from a complete ban on parading.

The appellant challenged the determination by way of judicial review on the grounds that the restriction imposed a disproportionate interference with a number of his Convention rights. In the context of his challenge to the Parades Commission's determination he sought disclosure of five documents containing views on which the Parades Commission had based its conclusions but of which it had only disclosed a summary. The Parades Commission resisted disclosure on the basis that the views contained in those documents were given in confidence. The application for disclosure was granted by the judge, but his decision was overturned by the Court of Appeal of Northern Ireland. Tweed appealed further to the House of Lords.

Opinions of the House of Lords

Their Lordships treated the applicable principles as being the same in both England and Wales and Northern Ireland.

Lord Carswell, giving the lead opinion, considered that it would now be desirable to substitute for the existing approach a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances.⁴ Nevertheless, he pointed out that due to the fact that claims for judicial review generally raise legal issues such applications do not routinely call for the disclosure of documents as is the case in ordinary civil actions. Even in cases involving factual issues where the need for disclosure is likely to be greater, for example, those in which questions of proportionality arise, disclosure would be carefully limited to the issues which require it in the interests of justice. This object would be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the instant case, rather than asking for an order for general disclosure.

Lord Carswell also commented on the fact that the Parades Commission had sought to fulfil its duty of candour by summarising the contents of summaries of reports and other documents relied on. It was not suggested that there had been any deficiency in candour in the manner in which that evidence had been put before the court. Nevertheless, his Lordship accepted that 'it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary'. His conclusion was that in the instant case as far as possible the court should have access to the original documents from which the decision maker had received information and advice.⁵

Where confidentiality is claimed in relation to the documents sought the judge considering disclosure should first receive and inspect the full text of all of the documents in order to decide whether that would give sufficient extra assistance to the appellant's case on proportionality, over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides the contrary in the case of any of the

⁴ See n 2, above, at para [32].

⁵ Ibid, at para [39].

documents, then that document will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any consideration.⁶

Lord Brown in his opinion agreed with Lord Carswell: 'The time has come', he said, 'to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, Lord Carswell's more flexible approach should apply.'⁷

He considered that the practical consequences of this approach were that the courts may be expected to show a 'somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker ...'.⁸

That said, he considered that such occasions were likely to remain infrequent because respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should be readier to do so whenever proportionality is in issue). But for the important matter of confidentiality arising in respect of the particular documents at issue in the instant case, he considered that it was almost inevitable that they would ordinarily have been exhibited, not least because that would have been simpler than summarising them. Without his having seen them, however, he could readily understand the appellant's concern that their effect may have been unwittingly distorted.

Lord Bingham in his short opinion, referred to cases where 'the precise facts are significant' and those which call for a 'careful and accurate evaluation of the facts'. He applied the caveat that even in these cases disclosure is not automatic and should only be given to the extent necessary in order to resolve the matter fairly and justly. Nevertheless, he gave a clear exposition of the sort of circumstances in which disclosure of documents is likely to be ordered in judicial review:

*'Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the appellant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom the application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.'*⁹

Comment

The House of Lords' relaxation of the overly rigid rules on disclosure in judicial review cases is welcome. Although the case was formally decided in the context of a human rights proportionality challenge, it is clear that the more flexible approach of the House of Lords is in principle applicable to any type of case which involve factual assessments. Indeed in practice it may be that the old approach was not always applied quite as strictly as might be assumed from the reported cases. More often than not it is the cases in which disclosure has been refused that are the ones that have generated formal judgments that have been subsequently reported rather than those cases in which disclosure was granted.

Also of interest is the inroad made by the House into any assumption that a respondent's duty of candour can be satisfied simply by explanation and summary of significant documents by the decision maker in its evidence. It is clear that generally such documents should be disclosed. Any scope for arguing that their disclosure is not necessary because they have been summarised in the

⁶ Ibid, at para [41].

⁷ Ibid, at para [56].

⁸ Ibid.

⁹ Ibid, at para [4].

respondent's evidence appears to be limited following *Tweed*. However conscientiously those summaries have been prepared, in most cases with considerable input from the respondent's lawyers, they are no substitute for the underlying document and it is generally not a fishing exercise to request them where they are not provided. It was unfair to require a claimant to cast around to try to create inconsistencies in the evidence in order to obtain the document referred to or to have to allege that there had been some intentional lack of candour on the part of the respondent, without sight of the document in question. Without sight of the document the court is in no better position than the applicant in its ability to determine whether or not they might present a different picture to that portrayed by the decision-maker. Furthermore, it is clear that the fact that a document contains sensitive material is not sufficient to prevent disclosure; mechanisms can generally be designed to protect such information in documents whilst still permitting disclosure of the rest of the document.

Again in practice an approach similar to that favoured by the House of Lords is already followed by at least some judges in the Administrative Court who are generally not content to see documents relied upon and mentioned in written evidence without seeing the actual document in question, but practice is inconsistent across different courts and tribunals where such issues arise. Also, as noted by Lord Brown, many respondents already voluntarily exhibit such documents to their evidence as a matter of good practice without necessarily being required to do so under the old approach. That practice is not however universally followed among respondents. Those respondents that do not follow such practice would do well to review their practice in the light of the opinions in *Tweed*.

The House of Lords' judgment is unlikely to lead to the courts in judicial review cases being swamped with applications for disclosure or with reams of documents. Nor are the burdens on respondents likely to increase unduly. The reasons for this include the fact that disclosure simply does not arise as an issue in many claims for judicial review, that disclosure is in any event not automatic and questions of proportionality must also be weighed in the balance. The fact that in practice disclosure has already been operated by some judges along these lines without such dire consequences may also confirm this prognosis. Also many respondents have eschewed the approach of extensively summarising documents and have interpreted their duty of candour as requiring them voluntarily to exhibit significant documents even before *Tweed*. In practical terms this approach is in many cases likely to involve less rather than more work.

The judgment in *Tweed* is therefore likely to be a useful contribution towards ensuring transparency in decision-making and greater consistency as to what documents should be before a court called upon to resolve those categories of public law challenges where factual issues are significant.

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